

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN**

IN RE: REFRIGERANT COMPRESSORS  
ANTITRUST LITIGATION

No. 2:09-md-2042

MDL No. 2042

Honorable Sean F. Cox

**MOTION BY THE VAST MAJORITY OF DIRECT  
PURCHASER PLAINTIFFS FOR THE APPOINTMENT OF  
THE MILLER LAW FIRM, P.C AS SOLE INTERIM LEAD  
COUNSEL AND THAT NO EXECUTIVE COMMITTEE BE APPOINTED NOW**

The vast majority of Direct Purchaser Plaintiffs in this multi-district litigation, through their counsel, respectfully submit this Motion, and in support state as follows:

1. On August 24, 2009, the Direct Purchaser Plaintiffs, through counsel, appeared before this Honorable Court for a status conference.

2. On August 24, 2009, this Court entered an Order Regarding Motions For Appointment As Interim Class Counsel (Docket No. 73), in which the Court ordered that “Plaintiffs’ Motions for Appointment as Interim Class Counsel/Liaison Counsel and for Appointment to the Interim Executive Committee must be filed NO LATER THAN Wednesday, September 9, 2009.”

3. This Motion and accompanying Brief in support are submitted pursuant to the Court’s Order.

WHEREFORE, based upon the foregoing and based on the Brief in support of this Motion, the movants request that the Miller Law Firm, PC be appointed sole interim lead counsel and that no executive committee be appointed now. In the alternative, if the court determines that an executive committee is necessitated, movants request that The Miller Law Firm, PC be

appointed sole interim lead counsel and Kaplan Fox and Hausfeld LLP be designated as the members of the executive committee.

DATED: September 9, 2009

Respectfully Submitted,

**THE MILLER LAW FIRM, PC**

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MAJORITY OF DIRECT PURCHASER PLAINTIFFS FOR THE  
APPOINTMENT OF THE MILLER LAW FIRM, P.C AS SOLE INTERIM LEAD  
COUNSEL AND THAT NO EXECUTIVE COMMITTEE BE APPOINTED NOW**

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**CONTROLLING OR MOST APPROPRIATE AUTHORITIES**

Federal Rule of Civil Procedure 23(g)

**STATEMENT OF ISSUES PRESENTED**

Should the Miller Law Firm, PC be appointed as sole interim lead counsel?

Movants Say: Yes

Should an executive committee be created at this time?

Movants Say: No

If the Court determines that the creation of an executive committee is warranted, should the law firms Kaplan Fox and Hausfeld LLP be designated its sole members?

Movants Say: Yes

**A. Standards Governing The Present Motion**

Pursuant to Federal Rule of Civil Procedure 23(g)(3), this Court may “designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.” Similarly, the *Manual for Complex Litigation (Fourth)* (2007) (the “*Manual*”) recommends that early in complex litigation the court select and authorize one or more attorneys to act on behalf of other counsel and their clients. Counsel so designated “assume a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of all parties and parties’ counsel.” *Manual*, § 10.22.

While neither Rule 23(g) nor the Advisory Committee Notes explicitly state the standards to be applied in choosing interim class counsel, courts have held that the same factors that apply in choosing class counsel at the time of certification of the class (that is, the standards set forth in Rule 23(g)(1)) apply in choosing interim class counsel. *See, e.g., Hill v. The Tribune Co.*, No. 05 C 2602, 2005 WL 3299144, at \*3 (N.D. Ill. Oct. 13, 2005) (“Rule 23(g) provides criteria to consider when appointing class counsel. No distinction is made regarding appointing interim counsel.”)

Firms designated class counsel have the duty to represent the interests of the class “fairly and adequately.” Fed. R. Civ. P. 23(g)(4). When competing applications for class counsel are filed, the Court is directed to consider the following factors:

- (i) the work counsel has done in identifying or investigating potential claims in the action;
- (ii) counsel’s experience in handling class actions, other complex litigation, and the type of claims asserted in the action;
- (iii) counsel’s knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A).

MLF easily meets the Rule 23(g) standards.

**B. The Miller Law Firm Is Well-Qualified To Lead The Prosecution of This Case**

This Motion is submitted by counsel in 32 of the 42 direct purchaser cases pending before this Court, who support the appointment of the Miller Law Firm, P.C. (“MLF”) as sole Interim Lead Counsel for direct purchaser plaintiffs, and who believe that appointing an executive committee is unnecessary at this time.<sup>1</sup> MLF has been involved from inception, working closely with the Kaplan Fox firm to investigate the case and to file the first action in this district. Movants have consulted leading experts regarding industry and economic issues presented by this case, utilized investigators to ascertain facts and identify witnesses, researched the market and relevant products and closely monitored parallel proceedings including those taking place in Brazil. MLF has also worked closely with Kaplan Fox and Hausfeld LLP to organize most of the other counsel who filed cases in this matter.

This Motion is supported by a great majority of Michigan counsel including, Norman Tucker and Jason Thompson of Sommers Schwartz, Paul Novak of Milberg, Pat Cafferty of Cafferty Faucher and Mark Baumkel. MLF also has the support of the overwhelming majority of the firms in this litigation and representatives of three of those firms have provided affidavits in support: the Affidavit of Steven Schwartz of Chimicles & Tikellis LLP, who served as co-lead counsel with Mr. Miller on two successful national class action cases (Exhibit 2); the Affidavit of Jeffrey Kodroff of Spector, Roseman, Kodroff & Willis P.C., who led the *OSB Direct Purchaser Antitrust Litigation* and worked directly with Messrs. Miller and Fink in that national antitrust

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<sup>1</sup> In support of this Motion, E. Powell Miller has submitted an Affidavit attached hereto as Exhibit 1.



MDL and witnessed the efficient and effective leadership of the MLF in *In re OnStar Contract Litig.*, MDL No. 1867 (E.D. Mich.) (“*OnStar*”) (Exhibit 3); and, the Affidavit of Mark Baumkel who worked with Mr. Miller as co-lead counsel in successful national class actions against manufacturers of dietary supplements (Exhibit 4).

As confirmed by the support of the consensus of the firms that have appeared in this case, MLF is well-qualified to serve as sole Interim Lead Counsel. MLF has extensive experience litigating complex class actions and antitrust actions throughout the United States and, particularly, in the Eastern District of Michigan. As a result, MLF has been appointed lead counsel or has had substantial responsibility in numerous class action cases in the Eastern District of Michigan *continuously* since 1995. MLF also has extensive experience outside of Michigan. *See* MLF’s Highlights of Class Action Experience, which is Exhibit A to the Affidavit of E. Powell Miller (“Mr. Miller”). For example, in March of 2009, MLF was appointed Co-Lead Counsel in the *AIG Securities Litigation* in the Southern District of New York representing, as Special Assistant Attorney General, the State of Michigan Retirement Systems. MLF’s experience has been recognized nationally. In fact, the firm’s managing shareholder, Mr. Miller, was appointed in August of 2009 as Co-Chair of the American Bar Association Subcommittee on MDL and Class Action Procedure.

Class action cases are rarely tried, but MLF believes it important to also handle complex commercial litigation cases in order to ensure that the firm has sharpened trial skills in the event trial becomes necessary in a class case. Mr. Miller has extensive trial experience, with 11 consecutive victories, including obtaining: a multi-million dollar bench trial award in July of 2009 in which the trial court described Mr. Miller’s trial work as “superb;” a jury verdict in the Eastern District of Michigan for more than \$10 million; a verdict in the Middle District of Florida for more than \$20 million; and, several other multi-million dollar verdicts. A summary

of Mr. Miller's successes at trial is attached as Exhibit B to his accompanying Affidavit and accounts for every case that he has tried to a verdict. In addition, MLF's class action cases have resulted in more than \$500 million in settlements, including two recent cases where the class received net cash recoveries of 100% of their damages.

One of those recent cases, *Street v. Siemens*, Case No. 03-885, (Pa. Ct. Com. Pls., 2005) ("*Siemens*") was featured in *Crain's Detroit Business* as a top result for 2005, likely because it was an example of a Michigan firm serving as a lead counsel<sup>2</sup> in an out-of-State case, which resulted in a partial summary judgment for the Plaintiff Class, and a \$14.4 million settlement reflecting a 100% recovery for more than 1,000 employees in a national class action. The presiding judge, Judge Bernstein, had been assigned to oversee most class actions pending in state court in Philadelphia for a considerable period of time and presided over many class action cases. In approving the settlement in *Siemens*, Judge Bernstein commented that, "If this case does not restore public confidence in class actions then nothing will." In *Gasperoni v. Metabolife International, Inc.*, No. Case No. 00-71255 (E.D. Mich. 2001), Mr. Miller served as Co-Lead counsel and achieved a multi-million dollar settlement against a dietary supplement manufacturer of dangerous dietary supplements. The District Court requested a Report and Recommendation on the quality of the work counsel performed from Richard D. Friedman, the Ralph W. Aigler Professor of Law at the University of Michigan Law School. Professor Friedman stated that "Messrs Miller and Baumkel<sup>3</sup> are extremely able lawyers of high standing. . . They are smart, energetic, and resourceful. They are a credit to the bar, and specifically to the

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<sup>2</sup> Steve Schwartz of the Chimicles firm was Mr. Miller's Co-Lead in the *Siemens* case. The Chimicles firm supports the Application of MLF for lead counsel in this case.

<sup>3</sup> Mark Baumkel was Mr. Miller's Co-Lead counsel in the *Metabolife* case. Mr. Baumkel supports the Application of MLF for lead counsel in this case.

plaintiffs' bar. I suspect that if more plaintiffs' lawyers were like them the public would have a far more positive view of lawyers than it has."

This year, Mr. Miller was named one of the "Top 10" lawyers in Michigan in the September 2009 rankings published by *SuperLawyers* magazine. In the last two years, nine MLF attorneys have been recognized by *SuperLawyers*. MLF has twenty attorneys experienced in complex litigation, including individual and class action antitrust litigation in numerous states.

In addition to committing the full resources of the firm to this case, MLF will commit the daily personal involvement of Mr. Miller and David H. Fink. Messrs. Miller and Fink commit to this Court that if MLF is appointed Interim Lead Counsel, they will be personally intimately involved with litigating this case, including attending hearings and will personally ensure the effective utilization of resources from the many firms which have agreed to assist in the litigation.

Further, MLF believes that it can work efficiently with defense counsel. Mr. Miller has been lead counsel in cases opposite Messrs. Sankbeil, Feeney, McIntyre and Barnes. Mr. Iwrey is a former colleague of Mr. Miller at the Honigman firm. Mr. Miller believes that mutual respect has developed between him and defense counsel over many years and that they will continue to be professional adversaries in many cases to come. Lawyers who know and trust each other promote the efficient and civil administration of complex litigation.

### **C. Co-Lead Counsel Is Not Necessary In This Case**

MLF also believes that it is unnecessary to appoint co-lead counsel. Appointing two firms to serve as co-lead counsel would likely cause duplication of efforts and inefficient prosecution of this case. No co-lead counsel was appointed by this Court in *OnStar*, the case that this Court has pointed to as being instructive on how the leadership structure here should be devised. Other counsel appointment decisions in this District have similarly favored

appointment of sole lead counsel. *See In re Packaged Ice Antitrust Litig.*, No. 08-md-01952 (E.D. Mich.); *In re Delphi Corp. ERISA Litig.*, 230 F.R.D. 496, 498-99 (E.D. Mich. 2005) (appointing sole lead counsel despite request for co-lead appointment).<sup>4</sup> As the accompanying affidavit of Jeffrey Kodroff, at Exhibit 3 indicates, MLF has functioned well as sole lead in *OnStar* and the case has been run efficiently and effectively. MLF intends to do the same in this case.

**D. The *OnStar* Model Works: No Executive Committee Is Necessary**

MLF, together with the other movants, also respectfully submits that appointing an executive committee is unnecessary at this stage of the proceedings. Designating such a committee would result in unnecessary duplication of effort, could result in the development of factions among law firms, and may impair the effective and efficient administration of this case. MLF suggests that, at least initially, MLF, as Interim Lead Counsel, should have the authority and responsibility to coordinate the efforts of attorneys willing to assist in the prosecution of this case in the same manner as it has in *OnStar*. In *OnStar*, MLF has effectively managed the many law firms involved, thereby avoiding duplication of effort and unnecessary layers of leadership while efficiently litigating the case, without any disagreements among counsel – and without a formal executive committee.<sup>5</sup> MLF would employ a similar organizational structure in the prosecution of this case.

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<sup>4</sup> In other districts, there has been an increasing trend to appoint sole lead counsel in antitrust class actions. *See, e.g., In re Graphics Processing Units Antitrust Litig.*, MDL No. 1827 (N.D. Cal.); *In re Static Random Access (SRAM) Antitrust Litig.*, MDL No. 1819 (N.D. Cal.); *In re Cathode Ray Tube Antitrust Litig.*, MDL No. 1917 (N.D. Cal.)

<sup>5</sup> In *On-Star*, the Court appointed David Fink of MLF as the sole member of the Executive Committee. It has not been necessary to add layers of leadership in *OnStar*, and movants do not believe it will be necessary here.

Movants in this case, as in *OnStar*, propose a lean leadership structure with a sole lead and no executive committee or, if an executive committee is necessary, only two firms. This lean structure promotes the efficient prosecution of the case.

**E. In the Alternative, if the Court Finds it Appropriate to Appoint an Executive Committee, the Kaplan Fox and Hausfeld Firms Should be Designated as the Sole Members of the Committee**

If the Court decides to appoint an executive committee at this time, MLF and the other firms joining in this Motion suggest that the Kaplan Fox firm and the Hausfeld firm be appointed as the members of the executive committee. Both firms have extensive experience in class action litigation and specialized expertise in antitrust litigation.

**1. The Kaplan Fox firm is Well-Qualified**

**a. Background of Kaplan Fox**

Specializing in antitrust and other complex cases, Kaplan Fox is one of the nation's preeminent plaintiff class action firms, with offices in New York, San Francisco, Los Angeles and Chicago, with 31 attorneys. For example, Kaplan Fox served as co-lead counsel in *In re Flat Glass Antitrust Litig.*, MDL No. 1200 (W.D. Pa.) and in *In re High Fructose Corn Syrup Litig.*, MDL No. 1087 (C.D. Ill.), two significant and successful antitrust litigations. (See attached Affidavit of Robert N. Kaplan, Exhibit 5.) Each produced key appellate rulings and the appeals were argued by two Kaplan Fox partners – Robert Kaplan in *In re Flat Glass Antitrust Litig.*, 385 F.3d 350 (3d Cir. 2004) and Greg Arenson in *In re High Fructose Corn Syrup Litig.*, 295 F.3d 651 (7<sup>th</sup> Cir. 2002). In each of these cases, Kaplan Fox successfully obtained complete or partial reversals of district court decisions granting summary judgment to defendants. Kaplan Fox attorneys then led the extensive preparation for trial of both these complicated antitrust cases until they settled within sight of trial for totals of \$122 million and \$531 million, respectively.

*Id.* At the end of the *Fructose* case, Judge Mihm complimented plaintiffs' lead counsel, including Messrs. Kaplan and Arenson, stating:

I've said many times during this litigation that you and the attorneys who represented the defendants here are as good as it gets. Very professional. At least in my presence or in my contacts with you, you've always been civil. You've always been cutting to the chase and not wasting my time or each other's time or adding to the cost of the litigation. (See Affidavit of Robert N. Kaplan at ¶16; Exhibit 5).

Kaplan Fox is currently serving as lead or co-lead counsel in a number of ongoing complex antitrust litigations, including *In re Hydrogen Peroxide Antitrust Litig.*, MDL No. 1682 (E.D. Pa.) (with settlements of \$97 million); *In re Air Cargo Services Antitrust Litig.*, MDL No. 1775 (E.D.N.Y. 2006) (with partial settlements of more than \$85 million); *In re Plastics Additives Antitrust Litig.*, MDL No. 1684 (E.D. Pa.) (with partial settlements of \$46.8 million); *Meijer, et al. v. Warner Chilcott Holding Co., III, Ltd., et al.*, Case No. 05-2195 (D.D.C.); and *In re Plavix Direct Purchaser Antitrust Litig.*, No. 06-cv-202-MHW (S.D. Ohio). (See Ex. A to Kaplan Aff.).

In the event the Court appointed Kaplan Fox to the Interim Executive Committee, Robert Kaplan, Linda Nussbaum, and Gregory Arenson will participate in the representation of plaintiffs and, if certified, the class in this case. Each brings strengths to this unique team of class action antitrust lawyers – Mr. Kaplan has more than 40 years experience in antitrust litigation; Ms. Nussbaum is a skillful, no-nonsense litigator with 30 years of broad-based antitrust experience; and Mr. Arenson has a strong economic background and procedural expertise applicable to antitrust cases. They have been co-lead counsel in antitrust class cases. They have tried antitrust cases. They have settled major antitrust cases. They have been involved in litigating every aspect of significant and complex antitrust cases from inception to conclusion for decades.

**b. The Kaplan Fox Team**

As detailed in the Kaplan Affidavit, Mr. Kaplan is a senior member of both the plaintiffs' antitrust and securities bar. In addition to being Co-Lead Counsel in several major antitrust cases, Mr. Kaplan is currently serving as Special Assistant Attorney General on behalf of the State Treasurer of the State of Michigan as Custodian for several Public Employee Retirement Systems in an action against Tyco International, Ltd.<sup>6</sup> *Id.* p 2-3. In 2009, partial settlements were achieved.

Ms. Nussbaum is experienced in virtually every aspect of complex antitrust litigation and has served and is serving as Lead or Co-Lead Counsel in many significant antitrust cases that have resulted in substantial recoveries. *See id.* p 3-5.

Mr. Arenson's economics background has provided a basis for his recognized expertise in handling economic issues in antitrust cases both at class certification and on the merits. *Id.* p.5-6.

Moreover, not only does Kaplan Fox have a strong working relationship with the Miller Firm, but Kaplan Fox and Hausfeld LLP have worked for many months developing this case. This has included a number of meetings held at Kaplan Fox's and Hausfeld's offices to which all direct purchaser counsel were invited to discuss the case and to coordinate efforts so that the case can be processed efficiently. As a result, the vast majority of direct purchaser plaintiffs' counsel have joined in this motion. Moreover, Kaplan Fox and Hausfeld were among the first firms to

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<sup>6</sup> *State Treasurer of the State of Michigan, as Custodian of the Michigan Public School Employees Retirement System, State Employees' Retirement System, Michigan State Police Retirement System and Michigan Judges Retirement System v. Tyco-Int'l, Ltd., et al.*, originally filed in this district, and later transferred to the District of New Hampshire for coordinated pretrial proceedings by the Judicial Panel on Multi District Litigation, MDL No. 1335. The Miller Law Firm is co-counsel with Kaplan Fox on behalf of the Michigan Retirement Systems.

file cases in this district and Linda Nussbaum of Kaplan Fox argued successfully before the Judicial Panel on Multidistrict Litigation that these cases should be centralized in this district.

**2. The Hausfeld Firm Is Well Qualified**

If the Court desires to appoint an Executive Committee at this time, Hausfeld LLP is also highly qualified to serve on it. Hausfeld LLP filed *Acme of Jamestown, Inc. v. Tecumseh Prods. Co.*, No. 2:09-cv-1045 (E.D. Mich.) (filed on February 26, 2009). That complaint reflected diligent research and contained extensive details about the operation of the alleged conspiracy. As reflected in that complaint, this case involves anticompetitive conduct occurring across the globe that has a direct impact in the United States and has prompted investigations by antitrust regulators in this country, the European Union and Brazil. Due to the major international presence it maintains in addition to a leading domestic practice, Hausfeld LLP could provide unique assistance in this case. In addition to its four United States offices (in Washington D.C., New York City, Philadelphia and San Francisco), it has an office in London and is the key player in collective claimants' cases brought in the European Union. Hausfeld LLP also has numerous affiliations with law firms in Latin America that will be useful in prosecuting these cases in the United States. Hausfeld LLP submits that it is uniquely situated to make optimal use of information learned through the international investigations that is relevant to the alleged conspiracy in the United States.

Hausfeld LLP has also done significant work in investigating the allegations supporting the claims asserted by the plaintiffs in this litigation. It has done extensive economic and company research on the market for hermetic compressors in the United States. Hausfeld LLP has also undertaken to organize counsel in the numerous cases filed throughout the United States. It, along with the Kaplan Fox firm, has been instrumental in organizing counsel for the



plaintiffs in a majority of the direct purchaser cases now centralized before this Court, as was reflected at the August 24 hearing.

Hausfeld LLP's 23 lawyers include some of the most experienced antitrust and class action attorneys in the United States. A copy of the firm's curriculum vitae is attached as Exhibit A to the accompanying Affidavit of Michael Hausfeld (Exhibit 6). More information on the firm is available at its comprehensive website, <<http://www.hausfeldllp.com>>. Michael Hausfeld, formerly the chairman of Cohen Milstein Hausfeld & Toll P.L.L.C., and now the chairman of Hausfeld LLP, is regarded as one of the country's top civil litigators and has been practicing for 40 years. He was recently recognized as one of the "Top 100 Influential Lawyers in America" by the *National Law Journal* and was praised by Chief Judge Edward Korman of the Eastern District of New York as one of the two "leading class action lawyers in the United States" and by the *New York Times* as one of the "most prominent antitrust lawyers" in the nation.

Michael Lehmann, the head of Hausfeld LLP's San Francisco office, who has been practicing for 32 years and who appeared at the August 24 hearing, has played a major role in a number of significant recent multidistrict antitrust class actions, including *In re International Air Transport Surcharge Antitrust Litig.*, MDL No. 1793 (N.D. Cal.) ("*Air Passenger*"); *In re Transpacific Passenger Air Transportation Antitrust Litig.*, MDL No. 1913 (N.D. Cal.); *In re Municipal Derivatives Antitrust Litig.*, MDL No. 1950 (S.D.N.Y.); *In re Publication Paper Antitrust Litig.*, MDL No. 1631 (D. Conn.); *In re High Pressure Laminates Antitrust Litig.*, MDL No. 1368 (S.D.N.Y.), and *In re Graphics Processing Units Antitrust Litig.*, MDL No. 1826 (N.D. Cal.).

Other highly experienced attorneys at Hausfeld LLP who are working on this case include Robert Eisler, who has 20 years of experience in class action and complex litigation (and who also attended the August 24 hearing) and William Butterfield, who has 30 years of

experience in complex litigation and is one of the country's leading experts in the field of electronic discovery.

Many of the firm's attorneys have served in leadership roles in major antitrust cases in many jurisdictions, including Michigan. *See, e.g., In re Cardizem CD Antitrust Litig.*, MDL No. 1278 (E.D. Mich.). Their cases have led to some of the largest antitrust settlements in history, including the *Rubber Chemicals Antitrust Litigation* in the Northern District of California, in which settlements of \$320 million were obtained, and the *Domestic Air Transportation Antitrust Litigation* in which settlements of \$458 million were recovered.

The depth of antitrust experience at Hausfeld LLP has been widely recognized since the firm's formation in November of 2008 by judges presiding over antitrust class actions. The firm has been appointed as co-lead counsel in no fewer than 19 major antitrust class actions, and its lawyers have garnered significant praise in the process. In *Air Passenger*, for example, the firm was praised by the District Judge, Charles R. Breyer of the Northern District of California, for its efforts in achieving "really, an outstanding settlement in which a group of lawyers from two firms coordinated the work . . . and brought an enormous expertise and then experience in dealing with the case." The Court also stated that the firm's lawyers are "more than competent. They are outstanding." Transcript of Hearing in *Air Passenger*, pp. 7-8 (Jan. 29, 2009), attached as Exhibit C to the Hausfeld Affidavit.

Similarly, in *Four In One Company, Inc. v. SK Foods*, 08-cv-03017, 2009 WL 747160 (E.D. Cal., March 20, 2009), District Judge Morrison C. England Jr. of the Eastern District of California praised the firm for having "the breadth of experience, resources and talent necessary to navigate a case of this import." In that case, "[a]lthough there [was] no question that the other firms proposed as co-lead counsel are also well qualified" the Court believed that only Hausfeld LLP and one other firm "st[ood] out from the rest." *Id.* at \*3.

Likewise, in *In re Rail Freight Fuel Surcharge Antitrust Litig.*, MDL No. 1869 (D.D.C.) (“*Rail Freight*”), District Judge Paul L. Friedman of the District of Columbia noted that Hausfeld LLP’s lawyers gained the support of the majority of plaintiffs’ counsel because of the “experience brought to the table.” “Memorandum Opinion And Order,” p. 3 (March 13, 2009), attached as Exhibit B to the Hausfeld Affidavit. Hausfeld LLP is similarly supported here.

In sum, Hausfeld LLP has a combination of resources, experience, international presence and expertise in antitrust, plaintiff and class action litigation. It also has a strong working relationship with MLF.

**F. The MLF Application Has Strong Support From Firms Experienced In Complex Antitrust Class Action Litigation**

Beyond MLF, Hausfeld LLP and Kaplan Fox, 81 other undersigned firms, representing plaintiffs in 32 other cases, support the structure proposed in this motion. Many of these firms are nationally-recognized specialists in antitrust and other class actions themselves, who have attorneys highly qualified to serve as lead or co-lead counsel, or to serve on an Executive Committee. Many of these firms currently serve as lead or co-lead counsel in other ongoing major antitrust and other class actions including some of the most significant cases currently pending. Yet, in the best interests of the class, these firms and their attorneys have agreed to support MLF as sole lead counsel in this case and to support Hausfeld LLP and Kaplan Fox for Executive Committee positions in the event that the Court decides to appoint such a committee at this time. This reflects the consensus that MLF, Hausfeld LLP, and Kaplan Fox have been able to achieve. It also reflects the outstanding leadership MLF has exhibited in both the *OnStar* case and in other national class actions, as reflected in the accompanying affidavits. These firms collectively agree that the Miller Law Firm is most well qualified to serve as lead counsel in this

case. As a result, they are committed to serve the interests of the class under the MLF's sound leadership.

The degree of consensus here is a significant factor in weighing the present motion. "By far, the most common method [of selecting among competing applicants] is the so-called private ordering approach." *Manual* § 21.272. *Accord* Third Circuit Task Force Report on Selection of Class Counsel, 208 F.R.D. 340, 355 (2002) ("Report"); Herbert B. Newberg & Albert Conte, 3 *Newberg on Class Actions*, § 9.35 (4<sup>th</sup> ed. West 2008) (a court should encourage the parties to agree on lead counsel). Under the private ordering approach, the attorneys agree upon who should be lead counsel, subject to approval by the court after it determines that counsel is adequate. *See Manual*, § 21.272. There have been numerous cases where private ordering has been recognized, even over the vocal protests of a minority of dissenters. *See, e.g., In re Intel Corp. Microprocessor Antitrust Litig.*, MDL No. 1717 (D.Del.); *In re Foundry Resins Antitrust Litig.*, No. 2:04-md-1638 (S.D. Ohio); *Processed Eggs Antitrust Litig.*, No. 08-md-2002 (E.D. Pa.); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, MDL No. 1869 (D.D.C.). The vast majority of Direct Purchaser Plaintiffs support this Motion.

Although a small minority of courts (mostly in securities cases brought under the PSLRA) have designated lead counsel using an auction method – essentially asking the moving attorneys to bid against each other to see who will accept the lowest amount of fees -- this approach has been strongly disfavored. This approach risks encouraging less qualified attorneys to bid lower than attorneys more qualified to handle complex litigation. As the Third Circuit Task Force found:

Some argue that auctions are an effective means of assuring that the lead plaintiff will fulfill its fiduciary obligation to retain effective counsel for the class. Yet it is in part precisely because we hold lead plaintiffs to that fiduciary duty that, on balance, we conclude that auctions are a highly imperfect device. The lead plaintiff has the fiduciary obligation not to retain the cheapest qualified counsel,

but rather to obtain the qualified counsel that is best able to obtain a maximum net recovery for the class. (Report, 208 F.R.D. at 387.

The auction approach or a predetermined cap on fees also usurps the appropriate exercise of the Court's discretion to award fees based upon the quality of the result and the Court's first hand observation of the quality of work performed. It also may encourage Defendants to render the case uneconomic for the class counsel knowing class counsel have a cap on their fees. This is contrary to the best interests of the class because it creates an artificial disincentive for class counsel and an inappropriate mis-alignment of interests between counsel and their clients. The fees in this case, as in the overwhelming majority of cases, should be determined by the exercise of the Court's discretion after the results are determined and not before the race is run.

In sum, MLF has a proven track record in effectively and efficiently leading complex class action litigation. and respectfully requests that the Motion -- brought by the 81 signatory firms -- be granted.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 9, 2009, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all attorneys of record registered for electronic filing.

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